13-495-cv(L)

13-545-cv(CON)

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 13-495-cv(L); 13-545-cv(CON)

THAI-LAO LIGNITE (THAILAND) CO. LTD.,
HONGSA LIGNITE (LAO PDR) CO. LTD.,

Petitioners-Appellees,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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—v.—

GOVERNMENT OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC,
Respondent-Appellant,

BANK OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC,
Intervenor-Appellant.

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BANK OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC,

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BRIEF FOR THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

Interest of the United States

Pursuant to 28 U.S.C. § 517 and Rule 29(a) of the Federal Rules of Appellate Procedure, the United States respectfully submits this *amicus curiae* brief in support of reversal of the order entered by the United States District Court for the Southern District of New York (Wood, *J.*) on February 11, 2013, affirm-

ing multiple discovery orders issued by the magistrate judge.

This matter concerns efforts by Thai-Lao Lignite (Thailand) Co. Ltd. and Hongsa Lignite (Lao PDR) Co. Ltd. (together, "Thai-Lao and Hongsa") to satisfy a foreign arbitral award against the Government of the Lao People's Democratic Republic (the "Lao Government") that was previously confirmed by the district court. In its February 11, 2013 order, the district court approved the extensive post-judgment discovery ordered by the magistrate judge concerning (1) United States bank accounts used to support the diplomatic functions of the embassy and United Nations ("U.N.") mission of the Lao Government; and (2) United States bank accounts held by the Bank of the Lao People's Democratic Republic (the "Lao Central Bank"). In doing so, the district court held that neither the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502 ("VCDR"), nor the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* ("FSIA"), shielded the Lao Government's diplomatic accounts or the Lao Central Bank accounts from discovery. The Lao Government and Lao Central Bank have appealed the district court's rulings.

The United States participates in this case as *amicus curiae* in support of reversal based on its strong interest in the proper interpretation of both the VCDR and applicable international agreements governing the presence of the U.N. in the United States. In addition, the United States has an interest in ensuring the proper application of the provisions of

the FSIA that provide special immunity for central bank funds. The district court's order inappropriately circumscribes the immunity afforded to the property of foreign diplomatic missions under the VCDR and to foreign central banks under the FSIA. If affirmed, the district court's order would have adverse consequences for U.S. foreign policy, would negatively affect U.S. diplomatic and financial interests abroad, and could have an adverse impact on the U.S. economy and the global financial system.

As explained below, the VCDR shields the Lao Government's diplomatic bank accounts from attachment and discovery. The district court incorrectly held that the Lao Government's diplomatic funds are subject to discovery and possible attachment under the FSIA because a portion of them are being used for "commercial activities." Funds used for commercial transactions that are related to the functioning of diplomatic missions, however, are not subject to attachment or execution under the VCDR. Article 25 of the VCDR obliges the United States to provide "full facilities" to the diplomatic missions of foreign states, and courts have interpreted this provision to provide immunity from attachment to bank accounts used for diplomatic purposes. The declaration submitted by a high-ranking Lao Government diplomatic agent, to which the district court gave insufficient weight, establishes that the funds subject to the district court's discovery order are used for diplomatic purposes, even if those purposes at times involve transactions that could be characterized as commercial. It is the use of funds for diplomatic purposes that is the

touchstone for determining whether those funds are immune from attachment under the VCDR.

The district court also erred in applying this Court's interpretation of the scope of the FSIA in *EM Ltd. v. Republic of Argentina*, 695 F.3d 201 (2d Cir. 2012), to conclude that while the VCDR may shield some property from attachment, it does not preclude discovery concerning such property. In *EM Ltd.*, this Court held that where a district court already has jurisdiction over a foreign sovereign, it is empowered to order discovery relevant to enforcing a judgment against that sovereign, even if the sovereign assets discovered ultimately may not be subject to attachment under the FSIA. *Id.* at 209. But *EM Ltd.* is inapposite, as the FSIA does not affect the nature or scope of diplomatic immunity under the VCDR. In addition to the "full facilities" that the VCDR obligates the United States to provide to the diplomatic missions of foreign states under Article 25, the VCDR shields diplomatic agents from their host states' civil jurisdiction and provides them with testimonial immunity (Article 31); shields embassy administrative and technical staff from their host states' civil jurisdiction for acts performed within "the course of their duties" and provides them with testimonial immunity (Article 37); renders the archives and documents of foreign diplomatic missions "inviolable" (Article 24); and renders the official correspondence of foreign diplomatic missions "inviolable" (Article 27). It is clear from these articles that the VCDR prohibits discovery against a foreign state concerning diplomatic property.

If affirmed, the district court's order would give rise to a host of adverse foreign policy consequences for the United States. The Court should defer to the Executive Branch's interpretation of the United States' international obligations under the VCDR, as well as its assessment of the foreign policy consequences of failing to meet those obligations. Deference is particularly appropriate with respect to the VCDR, because the United States and the Lao Government agree on the interpretation of the treaty, and that interpretation flows from the treaty's clear language.

The United States also has an interest in protecting foreign governments from intrusive discovery targeted at central bank accounts given the many foreign central banks that hold reserves in accounts in the United States. The Lao Central Bank's accounts are protected from discovery by FSIA § 1611(b)(1). In holding otherwise, the district court misapplied this Court's decision in *NML Capital, Ltd. v. Banco Central de la Republica Argentina*, 652 F.3d 172 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012), by focusing on the possibility that certain funds held by the Lao Central Bank belong to the Lao Government. But *NML Capital* correctly held that central banks need not be formally independent from their parent governments in order for § 1611(b)(1) immunity to apply, and that immunity also applies to funds held by central banks that are the property of the foreign state. *Id.* at 189. Under *NML Capital*, the dispositive question is not who "owns" the funds in question, but whether the funds are used for traditional central banking functions. *Id.* at 194. Here, a declaration

from a Lao Central Bank official was sufficient to establish a presumption that the Lao Central Bank's funds are used for traditional central banking functions, and thus immune from attachment and protected from discovery. Because petitioners failed to rebut this presumption by presenting any evidence that the funds were being used for other purposes, the district court's discovery order was inappropriate and failed to accord the Lao Central Bank the immunity to which it is entitled under the FSIA.

Statement of Facts

This case arises out of a November 2009 award issued by an arbitral tribunal seated in Malaysia in favor of Thai-Lao and Hongsa against the Lao Government.[1] (A 66). The district court entered an order confirming the award on August 3, 2011.[2] (A 126). Thai-

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[1] Citations to the Appendix are in the form "A__." Citations to the Lao Government's principal brief on appeal dated May 10, 2013 (Dkt. No. 205) are in the form "Lao Gov't Br. at __." Citations to the Lao Government's motion in support of a stay pending appeal dated February 19, 2013 (Dkt. No. 41) are in the form "Lao Gov't Stay Br. at __."

[2] The arbitral award was subsequently set aside by a Malaysian court in December 2012 (A 1164, 1169), and the Lao Government moved to vacate the district court's confirmation of the award in February 2013. (A 1161). As of the date of this brief, the Lao Government's motion to vacate is still pending before the district court.

Lao and Hongsa have sought extensive discovery related to their efforts to satisfy the award, and the magistrate judge assigned to this matter has issued several rulings approving Thai-Lao and Hongsa's discovery demands over the Lao Government's objections. The district court's February 11, 2013 order upheld the magistrate judge's discovery rulings.

A. The Discovery Demands and the Magistrate Judge's Rulings

Prior to confirmation of the award, Thai-Lao and Hongsa sought discovery concerning property or assets held by the Lao Government in the United States. By order dated April 4, 2011, the magistrate judge directed the Lao Government to produce records relating to U.S. bank accounts that it maintained. (A 119-20). The Lao Government objected to the magistrate judge's order on the ground that the discovery sought, which implicated bank accounts used solely for diplomatic purposes, would violate the immunity provisions of the FSIA and VCDR. (A 169). On September 13, 2011, the district court rejected the Lao Government's arguments, imposed sanctions against the Lao Government for failing to comply with the magistrate judge's order, and directed that discovery proceed. (A 167).

According to the Lao Government, following the district court's September 13, 2011 order, the Lao Government produced two years' worth of records relating to U.S. bank accounts used by its embassy and U.N. mission to support their diplomatic functions, including checks and check register entries showing

how the diplomatic funds were spent. Lao Gov't Br. at 10. Thai-Lao and Hongsa then sought deposition testimony from Lao Government officials. (A 1026-31). In response, the Lao Government requested a protective order from the magistrate judge. (A 1033). In support of its request, the Lao Government submitted under seal a declaration from Thongmoon Phongphilath (the "Thongmoon Declaration"), a diplomatic agent serving as First Secretary at the Embassy of the Lao Government in the United States. As explained by the Lao Government, the Thongmoon Declaration attested to the funds' use for diplomatic purposes such as maintaining the embassy and U.N. mission facilities, paying rent on those facilities, paying staff, providing necessary amenities for staff and visiting dignitaries, procuring office supplies, and paying for telephone and internet service. Lao Gov't Br. at 10-11.

By order dated November 26, 2012, the magistrate judge denied the Lao Government's request for a protective order (A 958), and on December 17, 2012, she denied the Lao Government's request for a stay of discovery to allow it to oppose the ruling before the district court. (A 985). Mr. Thongmoon was subsequently deposed over the course of two days, and after the deposition, Thai-Lao and Hongsa sought either further deposition testimony from Mr. Thongmoon or further records concerning the Lao Government's diplomatic accounts. Lao Gov't Stay Br., Ex. K. Among other things, Thai-Lao and Hongsa sought additional bank account statements, monthly financial reports sent from the embassy and U.N. mission to the Lao Government, and yearly funding proposals

sent from the embassy and U.N. mission to the Lao Government. *Id.*

Thai-Lao and Hongsa also sought discovery concerning the Lao Central Bank's U.S. bank accounts. In an order dated May 29, 2012, the magistrate judge directed the Lao Government to produce several categories of records, including records concerning the Lao Central Bank's U.S. bank accounts; the Lao Government's access to the Lao Central Bank's U.S. accounts; and any payments to be made out of the Lao Central Bank's U.S. accounts to the Lao Government over the next year. (A 498). The Lao Government responded by stating that it had no knowledge of or access to the Lao Central Bank's U.S. accounts. (A 646). Thai-Lao and Hongsa objected, and the magistrate judge issued a subsequent order dated July 20, 2012, directing the Lao Government to either (1) obtain responsive records from the Lao Central Bank, or (2) submit a sworn affidavit from a Lao Government official in support of the claim that the Lao Government had no knowledge of or control over funds held in the Lao Central Bank's U.S. accounts. (A 594). The Lao Government sought a stay of this discovery order pending a challenge in the district court, which the magistrate judge denied on July 31, 2012. (A 598). On August 3, 2012, the Lao Central Bank moved to intervene in this matter (A 602), and on August 6, 2012, it objected to the magistrate judge's rulings insofar as they imposed discovery obligations on the Lao Central Bank (A 721-22).

B. The District Court's February 11, 2013 Order

In its February 11, 2013 order, the district court upheld the magistrate judge's discovery rulings. (A 1128). The district court determined that the diplomatic accounts might be attachable under the FSIA, and thus susceptible to discovery, based on its understanding that the Thongmoon Declaration, as well as bank records regarding the diplomatic accounts, indicated that the accounts had been used for what the magistrate judge had characterized as "'a wide array of commercial transactions.'" (A 1153 (quoting magistrate judge's November 26, 2012 order)). Furthermore, relying on this Court's decision in *EM Ltd.*, the district court rejected the Lao Government's claim that the FSIA shields its diplomatic accounts from discovery, holding instead that "[p]etitioners are entitled to discovery regarding those accounts regardless of whether or not they are ultimately attachable" because the district court had established subject matter jurisdiction over the Lao Government.[3] (A 1155).

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[3] In *EM Ltd.*, this Court disagreed with the Seventh Circuit's decision in *Rubin v. Islamic Republic of Iran*, which held that "under the FSIA a plaintiff seeking to attach the property of a foreign state in the United States must identify the specific property that is subject to attachment and plausibly allege that an exception to § 1609 attachment immunity applies. If the plaintiff does so, discovery in aid of execution is limited to the specific property the plaintiff has identified." 637 F.3d 783, 799 (7th Cir. 2011). In doing so, the Seventh Circuit adopted a position similar to that

The district court also rejected the Lao Government's argument that the VCDR prohibited discovery concerning the diplomatic accounts, finding that "the concerns animating the Second Circuit's opinion in *EM* seem equally applicable in this context: once the Court has jurisdiction over a foreign sovereign, the Court may order discovery as it would over any other

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advocated by the United States as *amicus curiae* in *Rubin*, and which the United States recently reiterated to the Supreme Court in *Rubin v. Islamic Republic of Iran*, No. 11-431 (S. Ct.). Specifically, the United States took the position that even where a foreign state is subject to suit under the FSIA, its property is presumptively immune from attachment or execution. Accordingly, before discovery is permitted against a foreign state, the court should require the judgment creditor to demonstrate that the proposed discovery is directed toward assets for which there is a reasonable basis to believe that an exception to immunity applies. On April 15, 2013, the Supreme Court requested the views of the Solicitor General in *EM Ltd.*, now captioned *Republic of Argentina v. NML Capital Ltd.*, No. 12-842 (S. Ct.), and the United States intends to file a brief in that matter that fully sets forth its position on the important issues raised by *EM Ltd.* Notwithstanding *EM Ltd.*, however, as explained in Point I below, the district court's discovery order with respect to the Lao Government's diplomatic accounts was incorrect because those accounts are immune from discovery under the VCDR.

defendant," regardless of whether the diplomatic bank accounts are "ultimately attachable." (A 1156).

The district court also rejected the Lao Government's and Lao Central Bank's objections to discovery concerning the Lao Central Bank's U.S. accounts. Stating that the Court's holding in *EM Ltd.* foreclosed the Lao Government's sovereign immunity objections to such discovery, the district court held that because it had already established its jurisdiction over the Lao Government, "discovery may proceed as broadly as it would in a typical post-judgment context without regard to immunity issues." (A 1143). With respect to the Lao Central Bank, the district court noted that discovery must be ordered "circumspect[ly]" because, unlike the Lao Government, the Lao Central Bank had not waived its sovereign immunity, and because Lao Central Bank funds held for its own account are immune from attachment under § 1611(b)(1). (A 1147-49). Nonetheless, the district court determined that Thai-Lao and Hongsa could compel production of documents concerning the Lao Central Bank's accounts because the Lao Central Bank had not conclusively established that the funds in the accounts did not belong to the Lao Government. (A 1150).

Both the Lao Government and the Lao Central Bank appealed the district court's February 11, 2013 order. (A 1177, 1220).

ARGUMENT

POINT I

The Lao Government's Diplomatic Accounts and Diplomatic Personnel Are Entitled to Immunity

A. The VCDR Shields the Lao Government's Diplomatic Accounts from Attachment and Discovery

The VCDR governs the relationship between a sending state (here, Laos) and receiving state (here, the United States) with respect to the operation of the sending state's diplomatic mission, and affords certain privileges and immunities to embassies and diplomatic agents. These protections also extend to U.N. missions. *See* Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, art. V, § 15, June 26, 1947, T.I.A.S. 1676 (U.N. representatives will be entitled to the same privileges and immunities as the United States accords to diplomatic envoys); Convention on Privileges and Immunities of the United Nations, art. IV, § 11(g) (member state representatives to the U.N. will receive the same privileges and immunities as diplomatic envoys); *accord 767 Third Ave. Assocs. v. Permanent Mission of the Republic of Zaire*, 988 F.2d 295, 298 (2d Cir. 1993) (applying VCDR to define protection afforded to U.N. permanent mission). In particular, as relevant here, the Lao Government's diplomatic bank accounts, both its embassy and U.N. mission bank accounts, are entitled to the protections set forth in the VCDR. These protec-

tions shield the accounts from attachment and discovery.

The district court offered two rationales in support of its holding that the VCDR did not preclude discovery on the Lao Government's diplomatic accounts. First, the district court concluded that the funds might be subject to attachment (and thus also to discovery) because they were used for commercial activities. (A 1156-57). Second, applying the FSIA analysis in *EM Ltd.* to the VCDR context, the district court concluded that the fact that the diplomatic accounts might be immune from attachment did not render them immune from discovery. (A 1156). Both rationales are erroneous.

1. The VCDR Protects Diplomatic Property Used for Commercial Transactions That Are Related to Diplomatic Functions

The district court's characterization of the Lao Government's diplomatic accounts as being used for commercial activities, and thus subject to potential attachment, substitutes the scope of protection afforded by the FSIA for the distinct protections provided by the VCDR. Under the FSIA, the property of a foreign state may be subject to attachment or execution to satisfy a judgment if the property is both "in the United States" and "used for a commercial activity in the United States." 28 U.S.C. § 1610(a). But Congress enacted the FSIA "[s]ubject to existing international agreements to which the United States is a party," 28 U.S.C. § 1609, and the FSIA therefore does not circumscribe the broad protections and im-

munities conferred by the VCDR, *see* H.R. Rep. No. 94-1487, at 12 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6630 (FSIA is "not intended to affect either diplomatic or consular immunity"); *id.* at 23 (noting that, even following the enactment of the FSIA, "if a plaintiff sought to depose a diplomat in the United States or a high-ranking official of a foreign government, diplomatic and official immunity would apply"). Put simply, the FSIA exceptions to immunity from attachment are "inapplicab[le]" to an analysis of the validity of attachment where an international agreement such as the VCDR provides immunity. *767 Third Ave. Assocs.*, 988 F.2d at 297.

Under Article 25 of the VCDR, "[t]he receiving State shall accord full facilities for the performance of the functions of the mission." Accordingly, the standard for determining whether a diplomatic bank account is immune from attachment under the VCDR is not whether that account is used for commercial activities, but rather whether such immunity is necessary to ensure the "full facilities" to which the diplomatic mission of the sending state is entitled. VCDR, art. 25; *see also id.*, Preamble (explaining that the privileges and immunities conveyed by the VCDR are meant "to ensure the efficient performance of the functions of diplomatic missions"). Although no appellate court has reached this question, numerous district courts (most of which are in this Circuit) have concluded that according "full facilities" to a diplomatic mission includes providing immunity from execution or attachment on embassy or mission bank accounts that are used for diplomatic purposes, because such bank accounts are critical to the functioning of a

diplomatic mission. *See, e.g., Avelar v. J. Cotoia Const., Inc.*, 11-CV-2172 (RMM)(MDG), 2011 WL 5245206, at *4 (E.D.N.Y. Nov. 2, 2011) ("Bank accounts used for diplomatic purposes are immune from execution under [Article 25], as facilities necessary for the mission to function."); *Sales v. Republic of Uganda*, 90 Civ. 3972 (CSH), 1993 WL 437762, at *1 (S.D.N.Y. Oct. 23, 1993) ("It is well settled that a foreign state's bank account cannot be attached if the funds are used for diplomatic purposes."); *Foxworth v. Perm. Mission of the Republic of Uganda to the United Nations*, 796 F. Supp. 761, 763 (S.D.N.Y. 1992) (holding that "attachment of defendant's bank account is in violation of the United Nations Charter and the [VCDR] because it would force defendant to cease operations"); *Liberian Eastern Timber Corp. v. Gov't of the Republic of Liberia*, 659 F. Supp. 606, 608 (D.D.C. 1987) ("The Liberian Embassy lacks the 'full facilities' the Government of the United States has agreed to accord if, to satisfy a civil judgment, the Court permits a writ of attachment to seize official bank accounts used or intended to be used for purposes of the diplomatic mission.").

Indeed, the VCDR acknowledges that diplomatic staff will engage in commercial activities as part of their official duties without losing immunity for such activities. *See* VCDR, art. 31(1)(c) (providing that a diplomatic agent shall be immune from the civil jurisdiction of the receiving state "except in the case of . . . an action relating to any . . . commercial activity exercised by the diplomatic agent in the receiving State *outside his official functions*" (emphasis added)); *Tabion v. Mufti*, 73 F.3d 535, 538-39 (4th Cir.

1996) ("commercial activity" refers to "the pursuit of trade or business activity" unrelated to diplomatic mission); *Swarna v. Al-Awadi*, 622 F.3d 123, 139 (2d Cir. 2010) ("*Tabion* articulates the scope of acts as they relate to the term 'commercial activity' under Article 31(1)(c) for sitting diplomats."). Clearly, to the extent the Lao Government uses its diplomatic accounts to purchase office supplies and telephone and internet services, as well as to pay rent on the facilities that house its embassy and U.N. mission, such use is not commercial activity outside the official functions of the diplomatic staff, but rather is in connection with the performance of the functions of the mission.

Thus, absent evidence that the accounts were being used for activities unrelated to the Lao Government's diplomatic mission, there was no basis for the district court to conclude that the diplomatic accounts were arguably exempt from the VCDR's immunity provisions. Courts that have addressed the "full facilities" provision of VCDR Article 25 have routinely relied on sworn affidavits submitted by mission officials attesting that the accounts at issue were used for the functioning of the mission. *See, e.g.*, *Avelar*, 2011 WL 5245206, at *4 ("A sworn statement from the head of mission is sufficient to establish that a bank account is used for diplomatic purposes."); *Sales*, 1993 WL 437762, at *2 (reliance on mission head's affidavit, rather than "painstaking examination of the Mission's budget and books of account," is consistent with principle of diplomatic immunity); *Foxworth*, 796 F. Supp. at 762 (relying on declaration to describe nature and purpose of accounts); *Liberian Eastern Tim-*

ber Corp., 659 F. Supp. at 610 (same). Here, the Thongmoon Declaration submitted by the Lao Government was more than sufficient to establish the diplomatic nature of the accounts. As the magistrate judge observed in her November 26, 2012 order, the Thongmoon Declaration "states that the accounts in question are used for the purpose of maintaining the diplomatic functions of the Embassy and Mission, that any commercial transactions with third parties reflected in account statements were ancillary to that purpose, and that it would be 'difficult, and perhaps impossible' for the Embassy and Mission to function if the accounts were under threat of attachment." (A 961). The district court credited the magistrate judge's summary of the Thongmoon Declaration's contents, including Mr. Thongmoon's assertion of the substantial difficulties that the threat of attachment would place on the diplomatic mission's ability to function. (A 1153). Accordingly, the Thongmoon Declaration should have foreclosed any discussion of the "commercial" nature of the Lao Government's diplomatic accounts. Applying the appropriate VCDR standard, the accounts are entitled to immunity.

2. The VCDR Immunizes a Foreign Mission from Discovery and Precludes Testimony from Diplomatic Agents and Staff

The district court's conclusion that the Lao Government is subject to discovery regarding its embassy and U.N. mission accounts even if those accounts might be immune from attachment is likewise mistaken. In its opinion, the district court noted that "the concerns animating the Second Circuit's opinion in

EM seem equally applicable in this context: once the Court has established jurisdiction over a foreign sovereign, the Court may order discovery as it would over any other defendant." (A 1156). But there is no basis for extending *EM Ltd.*'s holding to discovery relating to diplomatic property that is otherwise protected by the VCDR. At the threshold, as discussed above, the FSIA does not circumscribe the protections afforded by the VCDR. Moreover, the Court's holding in *EM Ltd.* rested on its determination that post-judgment discovery did not implicate the FSIA because it did not affect the foreign state's immunity from attachment. 695 F.3d at 208. Thus, once subject matter jurisdiction was established under the FSIA, a district court "could exercise its judicial power over [the foreign state] as over any other party, including ordering third-party compliance with the disclosure requirements of the Federal Rules." *Id.* at 209.

There are several provisions of the VCDR, however, that provide immunity from the types of discovery allowed by the district court in this case. *Cf. Liberian Eastern Timber Corp.*, 659 F. Supp. at 610 n.5 (in light of the VCDR's provisions, it would be "a difficult task at best" to obtain discovery regarding diplomatic accounts). VCDR Article 31 provides that diplomatic agents "enjoy immunity from [the receiving state's] civil and administrative jurisdiction" and may not be compelled "to give evidence as [ ] witness[es]." Indeed, under Article 31, "[s]itting diplomats are accorded near-absolute immunity in the receiving state to avoid interference with the diplomat's service for his or her government." *Swarna*, 622 F.3d at 137. VCDR Article 37 extends those same protections to adminis-

trative and technical staff, who are immune from the receiving state's civil jurisdiction for acts performed within "the course of their duties," and may not be compelled to give evidence as witnesses. *See Vulcan Iron Works, Inc. v. Polish Am. Machinery Corp.*, 472 F. Supp. 77, 79-80 (S.D.N.Y. 1979) (VCDR protects administrative and technical staff, and "[t]hus, their failure to appear for depositions in response to the plaintiffs' subpoenas was excusable"). Thai-Lao and Hongsa's attempts to compel deposition testimony from Lao diplomats, or administrative and technical staff of the Lao embassy, are in direct conflict with VCDR articles 31 and 37.

Additionally, VCDR Article 24 provides that the archives and documents of the mission are "inviolable." According to a leading diplomatic law expert, "the expression 'inviolable' was deliberately chosen by the International Law Commission to convey both that the receiving State must abstain from any interference through its own authorities and that it owes a duty of protection of the archives in respect of unauthorized interference by others." Eileen Denza, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations 192 (3d ed. 2008); *see also 767 Third Ave. Assocs.*, 988 F.2d at 300 (concluding that the VCDR "was intended to and did provide for the inviolability of mission premises, archives documents, and official correspondence," and that the VCDR "recognized no exceptions to mission inviolability"). Compelled production of financial and operational records from the Lao Government's embassy and U.N. mission conflicts with this provision; so too would compelled production of documents more re-

cently sought by Thai-Lao and Hongsa, such as written reports prepared by the embassy and U.N. mission for the Lao Government concerning finances and accounts, and yearly proposals made to the Lao Government for funding.

Similarly, VCDR Article 27 provides for the inviolability of official correspondence of the mission. Insofar as the discovery sought by Thai-Lao and Hongsa seeks correspondence concerning diplomatic funds between the embassy and U.N. mission and the Lao Government, *see* Lao Gov't Stay Br., Ex. K., it could compromise the ability of the embassy and U.N. mission to carry out their functions in confidence, thus implicating the United States' obligation to "permit and protect free communication on the part of the mission for all official purposes" and to ensure the inviolability of the mission's official correspondence. VCDR, art. 27(1)-(2); *see also* Denza, Diplomatic Law at 211 ("Free and secret communication between a diplomatic mission and its sending government is from the point of view of its effective operation probably the most important of all the privileges and immunities accorded under international diplomatic law."). The district court's perfunctory rejection of the VCDR as a basis for immunity from discovery failed to account for these provisions, instead employing a commercial activity test that has no applicability and that led to an incorrect result.

The Court should defer to the Executive Branch's interpretation of the VCDR. *Abbott v. Abbott*, 560 U.S. 1, 130 S. Ct. 1983, 1993 (2010) ("It is well settled that the Executive Branch's interpretation of a treaty

is entitled to great weight." (citation and internal quotation marks omitted)). That is particularly true where, as here, the Executive's interpretation of the VCDR is agreed to by other parties to the treaty—in this case, the Lao Government—and flows from the treaty's clear language. *See id.* at 1993-95; *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982); *see also* Lao Gov't Br. at 28-38 (setting forth Lao Government's interpretation of the VCDR).

B. The District Court's Order Would Have an Adverse Effect on the United States' Foreign Policy

The district court's February 11, 2013 order would have several adverse consequences for U.S. foreign policy. For example, by subjecting the property of diplomatic missions to wide-ranging discovery and the threat of potential attachment, the district court's order makes it exceedingly difficult for those missions to plan for and carry out their day-to-day operations, thereby straining the United States' bilateral relationships and its relationships with the U.N. and its member state missions.

Moreover, the United States has a strong interest in promoting reciprocity with respect to the treatment of its own diplomatic missions abroad. *See Boos v. Barry*, 485 U.S. 312, 323 (1988) (respecting diplomatic immunity "ensures that similar protections will be accorded those that we send abroad to represent the United States"). Applied reciprocally, the district court's order would permit discovery into (and foreign judicial scrutiny of) sensitive communications dis-

cussing operational details of the United States' foreign missions, as well as the compulsion of testimony from United States diplomats and other diplomatic staff overseas, all of which the United States would vigorously oppose. The unique nature of U.S. discovery counsels in favor of U.S. courts treading carefully in this area, where the United States typically is not subject to this kind of judicial action abroad. The Executive Branch's assessment of the foreign policy consequences of the district court's February 11, 2013 order is entitled to deference. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 261 n.9 (2d Cir. 2007).

POINT II

FSIA Section 1611(b)(1) Protects the Lao Central Bank's Accounts From Discovery

The FSIA, which establishes a comprehensive and exclusive scheme for obtaining and enforcing judgments against a foreign state in civil cases in U.S. courts, *see generally Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989), includes a specific provision immunizing foreign central banks from attachment and execution. Section 1611(b)(1) of the FSIA provides that "the property of a foreign state shall be immune from attachment and from execution, if—(1) the property is that of a foreign central bank or monetary authority held for its own account." This provision recognizes that "foreign central banks are not treated as generic agencies and instrumentalities of a foreign state under the FSIA; they are given special protections befitting the particular sovereign interest in preventing the attach-

ment and execution of central bank property." *NML Capital*, 652 F.3d at 188 (citation and internal quotation marks omitted). Furthermore, this Court has acknowledged that this protection extends to discovery. *Id.* at 194 ("FSIA immunity is immunity not only from liability, but also from the costs, in time and expense, and other disruptions attendant to litigation."). The district court's February 11, 2013 order misapplies *NML Capital*, and fails to recognize the special protection due the Lao Central Bank under § 1611(b)(1).

In *NML Capital*, this Court made three holdings with respect to central bank immunity under the FSIA. First, it held that "the plain language, history, and structure of § 1611(b)(1) immunizes property of a foreign central bank or monetary authority held for its own account without regard to whether the bank or authority is independent from its parent state . . . ." *Id.* at 187-88. Second, it determined that "the plain language of the statute suggests that Congress recognized that the property of a central bank, immune under § 1611, might *also* be the property of that central bank's parent state." *Id.* at 188-89 (emphasis in original); *accord id.* at 189 (" 'By referring to the property of a foreign state and the property of a central bank interchangeably, Congress indicated its understanding that central bank property could be viewed as the property of a foreign state, and nonetheless be immune from attachment.' " (quoting *amicus* brief filed by the United States)). Third, the Court concluded that the phrase "held for its own account" in § 1611(b)(1) describes funds used for traditional central banking functions. *Id.* at 194. Recognizing

that the immunity conferred by § 1611(b)(1) includes immunity "from the costs, in time and expense, and other disruptions attendant to litigation," the Court adopted a test whereby funds held in an account in the name of a central bank are presumed to be immune from attachment absent a specific showing by the judgment creditor that the funds "are not being used for central banking functions as such functions are normally understood." *Id.*

Here, the district court improperly ordered discovery concerning the Lao Central Bank's U.S. accounts. The district court determined that the Lao Central Bank had provided "ample statutory evidence" that it was a separate entity (with a separate claim to sovereign immunity) from the Lao Government, and that unlike the Lao Government, the Lao Central Bank had not waived its immunity. (A 1148). The district court further determined that it had "not established jurisdiction over the Lao [Central] Bank as a separate entity." (A 1148). Moreover, the district court acknowledged "that specific details of accounts held by the Lao [Central] Bank are immune from discovery as well as attachment." (A 1149). And lastly, the district court recognized that in order to rebut the presumption that the Lao Central Bank's accounts are immune under FSIA § 1611, Thai-Lao and Hongsa must "show, with specificity, 'that the funds are not being used for central banking functions as such functions are normally understood.'" (A 1149 (quoting *NML Capital*, 652 F.3d at 194)).

Yet despite these observations, the district court concluded that petitioners were entitled to discovery

because the Lao Central Bank "[did] not conclusively establish that these accounts are the Lao [Central] Bank's property, and not [the Lao Government's]," pointing to a Lao law that it characterized as requiring the Lao Central Bank "to act as a custodian for the Lao Government's assets abroad." (A 1150). On this basis, the district court concluded that "Petitioners are thus entitled to discovery regarding [the Lao Government's] accounts, even though they may be held in the name of the Lao [Central] Bank." (A 1150).

The district court's ruling misapplied *NML Capital* by focusing on whether the Lao Central Bank accounts belonged to the Lao Central Bank or the Lao Government, a question that this Court has made clear is irrelevant to § 1611(b)(1) immunity determinations. *NML Capital*, 652 F.3d at 189. As this Court stated in *NML Capital*, the FSIA recognizes that central bank funds will often also be the property of the foreign state. *Id.* Furthermore, the Declaration of Oth Phonhxiengdy, Deputy Director General of the Lao Central Bank's Banking Operations Department ("Oth Declaration"), made clear that the Lao Central Bank's accounts in the United States are held in its own name, rather than the Lao Government's. (A 675). Thus, applying the test set forth in *NML Capital*, the funds in the Lao Central Bank accounts are "presumed to be immune from attachment under § 1611(b)(1)." 652 F.3d at 194. Thai-Lao and Hongsa could rebut this presumption only "by demonstrating with specificity" that the funds in question were "not being used for central banking functions as such functions are normally understood." *Id.*

Thai-Lao and Hongsa provided no "specific showing" of facts that would provide a basis to rebut this presumption. To the contrary, the Oth Declaration provides further support for the presumption that funds in the Lao Central Bank accounta are in fact being used for central banking functions. The Oth Declaration explained that the Lao Central Bank is authorized to engage in traditional central banking functions, including issuing legal tender and regulating the money supply, holding and managing foreign currency reserves, acting as a lender of last resort, and serving as the Lao Government's agent in dealing with international financial institutions such as the International Monetary Fund. (A 676-77). Furthermore, and in particular, the Oth Declaration clarified that the Lao law cited by the district court merely establishes that the Lao Central Bank holds the Lao Government's foreign currency reserves (A 676) —a paradigmatic traditional central banking function. *See NML Capital*, 652 F. 3d at 195 (noting that the accumulation of foreign exchange reserves is a "paradigmatic central banking function[ ]"); *accord Weston Compagnie de Finance et D'Investissement, S.A. v. La Republica del Ecuador*, 823 F. Supp. 1106, 1113 (S.D.N.Y. 1993) ("When the central bank acts as a bank for its parent foreign state. . . , it is engaged in a central banking and governmental function."). By failing to accord the Lao Central Bank a presumption of immunity, and allowing discovery to proceed despite the absence of any evidence that the funds at issue were not used for central banking functions, the district court incorrectly applied § 1611(b)(1).

It is critically important that district courts properly apply this Court's test with respect to the immunity of foreign central banks under § 1611(b)(1). The United States has an interest both in promoting reciprocal international principles of central bank immunity to ensure that U.S. reserves held by the Federal Reserve abroad receive adequate protection, and also in protecting foreign central banks engaged in central banking activities from interference by unwarranted litigation in U.S. courts. Many foreign central banks choose to hold their reserves in dollar-denominated assets in accounts in the United States. Foreign central banks invest their reserves in the United States because of the stability of the U.S. dollar, the unparalleled depth and liquidity of our financial markets, and the reliability of our political and judicial institutions. Equally critical has been the assurance long provided by United States law that central bank funds held in this country and used for traditional central banking functions are immune from attachment, save for very narrow exceptions, and not subject to discovery. If this traditional immunity is weakened through a misinterpretation of the FSIA and misapplication of this Court's binding precedent, foreign central banks might be led to withdraw their reserves from the United States and place them in other countries, and the preeminence of the U.S. dollar as a reserve currency could be jeopardized. *See generally* Ernest T. Patrikis, *Foreign Central Bank Property: Immunity from Attachment in the United States*, 1982 U. Ill. L. Rev. 265, 265-71 (1982); *see also* H.R. Rep. No. 94-1487, at 25 (explaining that the purpose of FSIA § 1611 is to protect the "funds of a

foreign central bank . . . deposited in the United States," because "execution against the reserves of a foreign state could cause significant foreign relations problems"). Any significant withdrawal of these reserves could have an immediate and adverse impact on the U.S. economy and the global financial system.

CONCLUSION

The district court's February 11, 2013 order should be reversed.

Dated: New York, New York
May 17, 2013

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 6,840 words in this brief.

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